U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 31Oct2002

Case No.: 2001-LHC-1180

In the Matter of:
OLLIE J. FLANDERS
Claimant

V.

COOPER/T. SMITH STEVEDORING
Employer

and

DIRECTOR, OFFICE OF WORKERS'S
COMPENSATION PROGRAMS,
Party in Interest

Appearances:
Christina R.L. Norris, Esq.
Louisville, KY
For the Claimant

Douglas A. U'Sellis, Esq.
Louisville, KY
For the Employer

Before: **THOMAS F. PHALEN, JR.**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, et seq.), herein referred to as the "Act." The hearing was held on December 11, 2001, in Louisville, Kentucky, at which time all parties were given the opportunity to present evidence and oral arguments. The following exhibits were received into evidence at the hearing: Administrative Law Judge Exhibits 1 - 3; Claimant's Exhibits 1 - 4, and Respondent Employer's Exhibits 1 - 5, and the record was held open for receipt of additional

evidence, pursuant to which the following was duly submitted: The Employer's Vocational Report of the Labor Market Survey of Catherine Stone, M.R.C., C.R.C., accepted into evidence as Respondent's Exhibit 6, and Complainant's Rebuttal Medical Report of Dr. Daniel Wolens, accepted into evidence as Complainant's Exhibit 7. Post-hearing briefs were requested and timely submitted. Full consideration has been given to those briefs, and to the testimony of witnesses, the documentary evidence and to the entire record in this matter.

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's injury, and that the Claimant filed timely claims for compensation. This court further finds that the Claimant suffers from a degenerative disc disorder that was the result of his March 23, 1993 work injury, and that he is permanently and totally disabled therefrom, for the period commencing on the date of his maximum medical improvement May 5, 1999 and continuing thereafter, based upon the following statement of the issues, stipulations, evaluation of the evidence and findings if fact and conclusions of law.

ISSUES

The parties stipulate, and I so find, that the following are the issues to be resolved in this decision and order:

1. Claimant's extent of disability

2. Claimant's loss of wage earning capacity.

3. Claimant's proper average weekly wage

4. The shortfall, if any, in Complainant's temporary total disability payments in regard to his average weekly wage.

STIPULATIONS OF FACT AND LAW

The parties stipulate, and I find**:**

1. The Act 33 U.S.C. § 901 et seq. applies to this claim.

2. The Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.

3. The accident/injury arose out of and in the scope of employment.
4. Date of accident/injury: March 23, 1993.

5. Date when Employer was advised or learned of accident/injury: March 23, 1993.

6. It is agreed that timely notice of injury was given to the Employer.

7. The Employer filed a first report of injury (LS-202) on: April 5, 1993.

8. The claimant filed a claim for compensation (LS-203) on: March 21,1994.

9. It is agreed that the Claimant filed a timely notice of claim.

10. Employer filed a timely notice of controversion on: April 15, 1994.

11.

	Nature of Disability	Time Period	
a.	Temporary Total	April 2, 1993 to April 20, 1993	For 2.71 weeks at $349.15 per week for a total of $947.69
		June 1, 1993 to June 13, 1993	For 185 weeks at $349.15 per week for a total of $648.43
		Mar. 14, 1994 to Mar. 18, 1994	For 0.71 weeks at $349.15 per week for a total of $249.40
		May 27, 1994 to May 27, 1994	For 0.14 weeks at $349.15 per week for a total of $49.88
		Nov. 2, 1994 to Nov. 4, 1994	For 0.42 weeks at $349.15 per week for a total of $149.64
		Feb. 24, 1997 to Feb. 24, 1997	For 0.14 weeks at $349.15 per week for a total of $49.87

		Feb. 26, 1997 to May 6, 1997	For 10 weeks at $349.15 per week for total of $3,491.50
		Oct. 17, 1997 to Oct. 19, 1997	For 0.86 weeks at $349.14 per week for a total of $299.28
		June 3, 1999 to Aug. 28, 2000	For 64.5 weeks at $349.14 per week for total of $22,594.40
b.	Temporary Partial	[None.]	
c.	Permanent Partial (non-schedule)	Aug. 29, 2000 to present	For weeks at $135.81 per week for a total of $
d.	Permanent Partial (schedule)	[None.]	
e.	Permanent Total (schedule)	[None.]	

f. (1) Were medical benefits under Section 7 of the Act paid? Yes

(2) If so, in what amount? $4,2703.04

12. The employer filed a Form LS-208 on September 8, 2000. PPD benefits are _____ continuing to date.

13. All reasonable and necessary medical benefits have been paid by Employer.

14. Claimant's "usual employment" consisting of his/her regular duties at the time of the injury as determined under Section 8 (h) of the Act as follows:

Heavy equipment operator.

15. Claimant has not returned to his regular employment with the Employer since the date of the injury.

16. [Interim earnings: No information stipulated.]

17. The Claimant's average weekly wage was $523.72, as of 3/23/93.

18. For a one year period immediately prior to the accident/injury, the Claimant was a five day per week worker.

19. The date of maximum medical improvement (MMI): August 28, 2000.[1]

20. Claimant has demonstrated a causal relationship between his/her alleged disability and his/her work accident. Therefore, he/she has invoked the presumption of causation contained in Section 20(a).

FINDINGS OF FACT

Based upon the consideration of the above stipulations, testimony of the witnesses at the hearing and in depositions, and a review of the documentary evidence admitted as exhibits, the following are my findings of fact:

The Claimant, Ollie J. Flanders, (Claimant, Mr. Flanders" or "Flanders," herein) was born on November 22, 1942, and is now age 59. He completed 10th Grade in high school, and six weeks in the 11th Grade. He worked in general construction, truck driving and dock work since he left school in 1958.[2] He is not presently employed, having been unable to work since his injury on March 23, 1993. Mr. Flanders is married.

I take administrative notice that the Employer is a maritime facility adjacent to the navigable waters of the Ohio River, where the Employer loads, unloads, cleans, repairs, and overhauls barges for the transportation of coal on the Ohio River.

The Claimant started working for the Employer, Cooper/T. Smith Stevedoring ("Employer," "Respondent, or Cooper, herein) in 1990, where he worked driving heavy equipment. His first job there involved opening railcar doors for dumping coal into hoppers for loading barges. This job is classified as "doorknocker," and involves using a 12 lb. sledgehammer to open the door, with several hits if frozen with ice. This may be from a slightly bent position, and may also employ a six foot, 12 lb. bar that requires working from a position on at least one knee, working from a dock, or shaker house, where the railcars are parked. They generally loaded a ninety car train in about 7 ½ hours. With ice, only one to five cars could be loaded.

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[1]See discussion of MMI, infra at p. 26, fn 3.

[2]The Employer's brief recites a number of different jobs performed by Mr. Flanders before he worked at Cooper/T Smith as stated by him in his deposition. The following were presented to me as some how not being hard manual labor: that he worked on some residential construction jobs doing framing and general labor before his employment at Cooper/T. Smith, jobs such as press operator and spray booth operator lifting items weighing a pound or two, gunpowder manufacturer working on the loading docks and driving a truck lifting at most 2 x 6 pieces of lumber [which, could be any size from 6' to 12' in length], over-the-road truck driver positions, supposedly with "with no heavy lifting" [I take judicial notice of the fact that all truck drivers have to be able to change tires which weigh as much as 50 lbs. each], fork lift operator with "no heavy lifting involved," refrigerator truck driver, dump truck driver, grocery delivery driver, etc., I find that all of these positions involve such manual labor, and that they could not be sustained for an eight hour day, or five day week in his condition at the time of the hearing, as described by Dr. Rouben, which I have otherwise credited herein.

Later, as a "shaker house operator," Mr. Flanders described sitting in a booth, and using controls to operate a haul system that pulls the railcars into the shaker house. Six or seven ton "shakers" are then aligned over the railcars, and then lowered onto them. They then shake or vibrate the cars until they are empty of the coal being unloaded into the hoppers. From the hoppers, the coal travels on feeder belts to larger conveyor belts, then to larger hoppers. At times, the operators have to leave the house to shovel and move the coal away from the belts and equipment.

Mr. Flanders also operated the locomotive, to hook-up cars to move them into the shaker house, eighteen cars at a time. Summer locomotive operation is easier than the winter, when ice on the hopper doors requires relief assistance for the doorknockers, sledge hammering the locks to get them open, as much as several times a day. There are three stairs with handrails, to climb down out from, and then up to, the platform, the first stair being 1 ½ feet above the ground.

Additionally, Mr. Flanders acted as switchman of the railcars. The switchman walks along side the cars, bleeds air from the brakes, and pulls the levers to break the cars loose when moving the cars. He also switched tracks, by throwing the switch to do so. The switch handle weighed 50 lbs. and had to be lifted to throw the switch.

He also operated the stacker which starts the conveyor belts to "stack" the coal, and watched the belts to see that they did not overflow. He operated the "988" (an end loader used for scooping-up coal from the ground, dumping it into the hoppers, loading trucks and reclamation), and the "910" (a foam filled, rubber tired front loader used in the barges to move coal). He has acted as bargemen, manipulating the ropes to tie-up the barge, tying the barge to the "timberhead". He would have to climb seven stories into and out of the barges, climbing both ladders and stairs to do so. He also described other jobs that he did at various times, on the docks and barges, that required lifting and climbing.

At the time of his injury, Mr. Flanders operated a hopper that required climbing ladders to get into and out of it. Above it was a 21 yard clam bucket which ran over the coal and filled the hopper. Trucks then pulled under the hopper, and doors were opened by pushing buttons to load the trucks. A PA system directed trucks to move when the loads were level. A hopper platform, about twelve feet off the ground, gave room for the trucks to get under the hopper and load them from it.

On March 23, 1993, the date of Mr. Flanders injury, an Ohio River flood was receding and had left a residue of mud on the road adjacent to the Employer's docking facility. Cleaning was required to get the mud off the roads, so that winches could be reinstalled, following their removal due to the flood. Reinstallation had been completed; the barges were in the water, and they were ready to operate.

While Mr. Flanders was completing several trips up and down the ladder to carry the PA system, his radio and his paperwork to the hopper platform and booth, he had caused mud to be spread from his hands, gloves and feet to the ladder. In the final climb, he had placed the paperwork on the platform, and reached to put the thermos on it to prevent its blowing away, when his foot and hand slipped, and he fell six to seven feet to the ground. He landed on a ten (10) foot ladder, which was lying on the ground by the block wall where he fell on his left side, breaking the leg of the ladder.

Following the fall, Mr. Flanders got up and put everything in the control booth. He reported the accident to his supervisor, Al Murrell, who sent a Foreman named "Jeff" to take Mr. Flanders to the hospital. He was x-rayed and returned to work. A bruise on his hip resolved, but his tail bone "was very hard - sore, and had a big knot come up." When he returned to work, he showed the tail bone knot to Murrell who made an appointment for him with the company physician.

The Employer presented no witnesses to contradict this evidence. I credit the Claimant's description of his employment at Cooper/T. Smith Stevedoring in full, and that concerning the details of his accident and injury on March 23, 1993.

Mr. Flanders testified that Dr. Duran, the company doctor, prescribed traction to reduce the swelling, which was apparently performed for three weeks before Dr. Duran actually saw him. He had approved Mr. Flanders for work soon after the injury and then released him from work for the traction. He also sent him for an MRI. In February 1994, Dr. Duran referred Mr. Flanders to Dr. Rouben. In terms of other lost work time while under Dr. Duran's care, Mr. Flanders testified that he was off from work approximately three weeks in 1993, and another week in 1994.

Dr. Rouben sent Mr. Flanders for x-rays and an MRI, and then gave him six epidural steroid shots through 1996. He also had two "discgrams" and myelograms. While somewhat successful, the steroids made him "violent" and he had to stop them. During this time, he always asked to go back, and did so without restrictions. After 1996, he told Dr. Rouben that he could not take the epidurals, and was sent for another MRI. Dr. Rouben recommended back surgery for "cleaning arthritis and calcium deposits" which was performed between L2 and L5/S1 in 1997. (He had a bilateral decompression laminectomy from L2 through S1, for which he was off work from February 27, 1997 until May 5, 1997.)

Mr. Flanders testified that he never had back pain or accidents before the March 1993 accident. He was released for work on May 5, 1997, which, at his request, was without restrictions, since he would not have been able to work with them. He returned, operating the 988 loader, screening coal. After his return, he developed sharp pains in his lower back, across his hips and down both legs, resulting in a return to Dr. Rouben in August 1997.

Following x-rays, Mr. Flanders began showing spine curvature (scoliosis), and had two more visits that extended into 1998, while he continued to work. His back bothered him continuously, and he had trouble climbing up and down ladders. He worked anyway, and "just ... couldn't stop." His back kept getting worse, so he went back to see Dr. Rouben when his back showed a 20% curvature. He testified without objection that Dr. Rouben told him he would be paralyzed if he did not quit.

On May 5, 1999, Mr. Flanders quit when he could not take it anymore. This was the day on which he stated that he accepted all of the restrictions. He tried to go back to work, but restrictions prevented him from operating heavy equipment, knocking doors and shoveling. He could not shovel or lift over 20 lbs., although he maintained a lifting ability of 40 - 50 lbs. from waist high.

By 1998, Mr. Flanders testified that he was earning $14.10 per hour, plus a shift differential, taking him to $14.95. He testified without contradiction that he worked from 80 to 111 hours per week during that period, since they had a lot of work, and could not get other employees to work.

This continued until he left on May 5, 1999.

Mr. Flanders testified that after stopping work, his back got worse, with more problems with his legs, and trouble sleeping, being unable to stand the covers, or even clothing touching him, especially the past few months before the hearing. He has to lay on the floor with a pillow under his head, feet on the chair, and a blanket rolled up, under his left hip, for one to two hours. He has an inversion table, where he hangs at a fifteen degree angle.

In the morning he stays in his shorts; walks around, straightens the garage, goes back in the house, and sits in the recliner. He has problems standing, sitting, bending or driving for long periods of time. He has to rest. He can only walk one half of a mile. He could do more in 1999 than in 2001. The major difference is that he now gets severe pain doing various things. His legs give out and he then has trouble standing. It now takes a week to mow his lawn, instead of a few days - on a riding mower. He described his present pain as a "nine," with weather affecting its level.

He no longer takes the pain pills that he was because "they got to the point where they really wasn't having that much affect on me, but I liked to take them for the buzz off them. So, I got away from them." He took Vioxx until severe headaches began, and he decided that he could stand the back pain better than the headaches, so he got off them.

Mr. Flanders testified that Employer's Vocational Consultant, Catherine Stone, interviewed Mr. Flanders for about 30 minutes, and did a report in June 1999. It stated that there were jobs that he could do, including telemarketing for the Clampton Agency. He was told by a Clampton representative that they were looking for people with experience in that field. Others included collection agents, production clerks, surveillance monitor, sales attendant, dispatcher, mail clerk, counter attendant, photo finisher and electronics worker. A number stated that the jobs were filled, or that they would give him an application, but chances of getting a job there were "slim." He did not have the finances to drive the fifty miles from Salem, Indiana to Louisville, where most of the jobs were.

Even though Ms. Stone did not provide him with the new labor market survey containing the phone numbers of the places suggested until the date of the hearing, he called them on the day of the hearing. One, Paula York, said to come over and fill out an application, and they would try to find something within his restrictions. The ticket sales referral telephone call resulted in his being told that he had to have good communication skills with people, which he knows he does not have. He was unable to get hold of the newspaper sales and circulation promoter. One number was a wrong number. The photography sales representative told him to come to an open house two days later, but that he needed sales experience, which he did not have. The telemarketing group required a lot of standing and driving, lifting 30 lbs. delivering packages, which he could not do. The Pine-X Window Company said, when he contacted them by computer, that they would send him an application and handout on job qualifications. He has had no experience in selling windows. Thornton's Oil told him he would have to stand 8 hours a day behind a cash register, with some shelf stocking. He has had no experience in computer cash registers. Clark American, a laundry, offered to review his application, but it would involve standing, lifting, squatting and bending, while Zip Express would involve delivering mail and constant driving. Mr. Flanders testified, and I credit his testimony on these points, that he could not realistically perform these jobs.

Yet, Mr. Flanders testified that if he could go back to work at Cooper/T. Smith, he would do so; but also verified that he could only stand for an hour, now; sometimes, less, and sit for 45 minutes on office type chairs.

He testified that no vocational training was offered to him by Ms. Stone.

On cross examination, Mr. Flanders added that in checking job recommendations of Ms. Stone, he had no answer from Sam's Club, and that he had not put in applications at the others, since he had only received the list on the date of the hearing, but would do so. He also had made reference to the Courier Journal, (Louisville) and looked at advertising there to try to find matching jobs in the Salem, Indiana area, so he would not have to drive 50 - 60 miles, one way. He testified that he told those that he called, his restrictions, and that he would go to work for them if they would accept his restrictions. Mr. Flanders asked about chances to stand and sit several times an hour, or in couple of hour time period, or the opportunity to walk around a little bit. There was not much of a chance of doing so. He has not otherwise tried to return to work since May 1999.

Mr. Flanders had not seen Dr. Rouben since January 10, 2001, but was scheduled to see him on January 9, 2002.

After observing Mr. Flander's testimony, and considering a number of factors including his consistency, his deliberateness and his demeanor, I credit his testimony in full. He was consistent in relating both the attributes of his symptoms and the effects of them, including his attempts at seeking local employment.

Dr. David P. Rouben Deposition:

Dr. Rouben credibly testified by deposition on November 15, 2001 that he has been board certified in orthopedic surgery since 1995. (CX 3, p. 4 & Ex. 1) He first saw Mr. Flanders on February 16, 1994 due to his expertise in adult spinal problems, upon referral from his treating physician, Dr. Duran. Dr. Rouben reviewed Dr. Duran's records, and together with his own discussions of the patient's condition with him on February 16, 1999, (CX 3, p. 5) made the following observations and diagnosis, and engaged in the following course of treatment.

Claimant first described the past year from the time of his fall, as involving bilateral back, buttock and leg pain; numbness, weakness and difficulty ambulating; most "misery" on the right but bilateral and involving three neurological levels, with conservative treatment (no surgery) by Dr. Duran. He had no low back symptoms prior to the fall. He has continued to work at his job, involving "a lot of lifting, bending and shoveling."

Dr. Rouben's clinical exam revealed, "flexion contracture of his hip [permanent contraction of a muscle due to spasm or paralysis] in that he was unable to stand erect and extend his hips out in an upright position ... [and] negative straight leg raising signs, which meant ... no direct neural compression in seated position." "There were signs implying neural inflamation and irritation to the L3 and L4 nerve roots," consistent with x-rays, "demonstrating collapse of the normal disc height space" there, and at L3-4, L4-5 and L5-S1. A related MRI showed central and left sided protrusion at the L3-L4 level, bilateral protrusions at the L4 - L5 level, both touching the spinal neural sac, with

direct pressure on it. There was also a protrusion at L5-S1. These would give Mr. Flanders pain in the back, buttock and down the leg (back and front of thigh, and back of lower calf and foot, objectively confirming his subjective complaints of pain, inability to stand erect and additional hip pain, even though there was nothing wrong with his hip joint.

Dr. Rouben's course of treatment included epidural injections at the L3-L4 and L4-L5 levels; back strengthening and stretching exercises, with the intent for a return visit in four months. Through this, Mr. Flanders continued to work. Dr. Rouben volunteered this statement: "I'll tell you this. This is a guy who I couldn't imagine how he could work, but he kept wanting to go back to work, and that's – - was his experience up until the very end when he finally was able to return to work." (T-11) **[This is one of the strongest statements that I have received from a testifying physician in any case. It is well documented by his examination and the records, and is a totally credible statement.]** The epidural injections in August 1994, followed the exercises. He also gave Mr. Flanders a lumbosacral brace and corset that he wore whenever he was active and sitting on heavy machinery and doing work. Dr. Rouben testified that Mr. Flanders gets recurrent symptomology in his back if he doesn't wear the brace, or stands for a protracted (one hour) period of time.

In August 1995, Dr. Rouben ordered another MRI, and an epidural injection which yielded only three to four weeks of relief, followed by pain in the low back, bilateral buttocks, and both legs. This demonstrated persistence of the protrusions and loss of hydration (desiccation) at the lower four disc space levels (EX 4, p. 2); provided evidence of progressive collapse of the normal disc height and buckling of the annular tissue (the outer casing of the disc), and explained the direct pressure against neural tissue at all four disc space levels. To quantify the extent of permanent damage to his nerve function, he directed other tests.

In October of 1995, Dr. Rouben directed a discogram (a CT scan), with an injection of dye into the four affected disc spaces. No typical pain was reproduced, but a pattern of morphology was shown. In this condition he said, "the inherent structure of the disc segments allows the joints and the peridiscal tissue to become inflamed if ... they're loaded with gravitational pressure and also because of the segmental changes inherent to function." (T 16) He proceeded to treat "as intrinsically as [he] could, the mechanical source of the pain, that is the facet joints ... that connect the bone above and the bone below together, and to try to block as completely as possible the pain attributability (sic) to the segmental collapse and the abnormal segmental motions of each bony space segment." **[I find that this condition resulted in what constituted an aggravation to Mr. Flanders' back as a result of his continuing to work for the Respondent Employer.]** As a result he then went from epidural injections to facet injections to control the pain. **[This permitted the Claimant to continue to work.]**

On September 30, 1996, he saw Mr. Flanders again, after he had a myelogram at Southwest Medical Center showing stenosis (tightness or constriction) of the spinal nerves at the L4-L5, and L5-S1 disc space segments. The latter relates directly to the back/buttock/leg pain down the posterior aspects of the thigh and calf, with compromise to the lateral aspect of the calf, and front and back of the foot. There was continued direct pressure upon the front part of the spinal sac at all lower four disc space segments, and all as a result of the original injury "without question." (T 16-17) **[I find that this condition resulted in what constituted further aggravation to Mr. Flanders' back as a result of his continuing to work for the Respondent Employer.]** Due to the above, Dr. Rouben

felt that a decompressive laminectomy of the lumbar spine was appropriate to maintain his level of functioning, for both work and daily activities.

In December 1996, Cooper/T. Smith asked for a second opinion from Independent Medical Assessments, Dr. Auerbach's group, for which Dr. Rouben talked with Dr. Auerbach and forwarded the myelogram and CT scan reports and other records regarding his plan. In January 1997, Dr. Auerbach had initially rejected the idea of a fusion, stating that he was not aware of the most recent myelogram and CT scan. When Dr. Rouben advised Dr. Auerbach that he was not advising a fusion, and only a decompression, Dr. Auerbach agreed, and approved it, concurring with Dr. Rouben's opinion.

On February 27, 1997, Dr. Rouben performed the bilateral decompressive laminectomy of L2-L3, L3-L4, L4-L5 and L5-S1 spine levels. He then found that Mr. Flanders had a 14 % impairment rating to his back and his body as a whole, based upon the Fourth Edition of the AMA Guidelines. He placed restrictions of extension limited to 10%, lateral bending, with rotation and flexion uninhibited. He was otherwise unrestricted and sent back to work under those conditions. Dr. Rouben confirmed that these unrestricted aspects were at the request of Mr. Flanders, and explained that Mr. Flanders was fearful that he would be discharged from his employment if he had restrictions placed upon his return. He stated that Mr. Flanders really liked what he did, he loved to drive the heavy loaders and ... just liked to work....
(T 22) Mr. Flanders felt commitment to his family and to continue as long as he could do it.

A new onset of low back pain brought Mr. Flanders back to Dr. Rouben in November 1997. X-rays showed progression of deterioration of intrinsic structure of Mr. Flanders' spine, and of scoliotic deformity, which happens when the disc spaces collapse, and the spine starts to tilt. Dr. Rouben continued to associate this disease to the injury of March 23, 1993. **[Again, I find that this condition resulted in what constituted further aggravation to Mr. Flanders' back as a result of his continuing to work for the Respondent Employer.]** Dr. Rouben wanted to see him semiannually, and felt he was just working excessively and more than he really should've, that he had just overwhelmed his basic structure. ... [T]hat ... there was no specific new injury ... that this was a sprain and strain and that he had irritated up his back. (T 23-25)

In May of 1998, Dr. Rouben again saw Mr. Flanders due to weakness and collapse of his right leg associated with low back discomfort, soreness and stiffness, leading to an inability to stand erect, and leaning to the right, with an 18 % deformity, rapidly progressing from one to 10 % in November 1997. He stated: [I]t was mind boggling to me that he was still determined to continue to try to return to work. (T 25-26) **[I credit this well documented statement, and find that this condition resulted in what constituted additional aggravation to Mr. Flanders' back as a result of his continuing to work for the Respondent Employer.]**

A June 1998 EMG nerve conduction study was consistent with bilateral neural damage, with "radiculopathies" at L3-L4 and L4-L5 levels, severe degenerative and direct structural collapse of the disc space segments, pressure against the neural tissue with swelling, fluid collection within the bones consistent and with compression and pressure, and slipping of each bone posterior to the other one. Again, these were all well documented by the x-rays, MRI, EMG and clinical assessment, and establish that he could not work. By October 1998, he was still trying to work, "pushing himself as

hard as he could to maintain his money making potential." (T 27)

Mr. Flanders quit work on May 5, 1999, but tried to return. When Dr. Rouben saw him on May 10th, he found that Mr. Flanders was no longer able to work. Dr. Rouben determined that Mr. Flanders had progression of pain, weakness, numbness and inability to sleep at nighttime." It was "more accentuated with associated weakness when working heavy machinery.

Dr. Rouben testified that they had to sit Mr. Flanders down, "and cause him to accept the fact that it was not a compromise to his manliness that he couldn't return to work..." due to these factors. These were outlined in a letter to the Employer dated May 24, 1999. In it, in response to a question from the Employer, Dr. Rouben emphasized his opinion that the scoliosis was "not a deformity that predated his on-the-job injuries"; and that, as stated therein: "[T]his structural destabilization of the progressively degenerative spinal segments is because of the damage to the area for which you, Cooper/T. Smith, have assumed responsibility." (T 28-30)

He also warned that if he were to return to work, he "would basically be faced with a decision of being bed or wheelchair ridden or have some structure stabilization performed." The progression was such that he "was at risk of permanent catastrophic neurological damage ... [without] ... "some structural stabilization of his pain..." including fusion of the four disc space segments, leaving him with limited motion to his back, and requiring the use of a full back brace to function without any motion whatsoever except at his neck or at his hip joints." (T 28-30)

Finally, Dr. Rouben recommended exertional restrictions to Mr. Flanders, limiting lifting to 20 - 30 lbs, bending over at the waist or twisting at the waist in a bent over position. (T 31) On September 20, 1999, he wrote a note concurring with further permanent restrictions placed by Dr. Auerbach on July 12, 1999, of lifting from the floor more them 25 - 30 lbs., and of handling 50 lbs. from table height to table height on an occasional or frequent, but not repetitive, basis. (T 31)

Replying to other questions on July 2, 1999, he noted a question as to whether Mr. Flanders could function within that status for an eight hour period, to which he answered that: "These are issues yet to be determined", meaning, that he "wasn't sure that he could work for eight hours", for "all the reasons stated above." (T 32)

[These observations on examination by Mr. Flanders' treating physician were uncontradicted on the record, and I find them to be the result of additional and cumulative aggravation to Claimant's back as a result of his continuing to work for the Respondent Employer. They serve as a substantial basis for a determination that May 5, 1999 constituted Mr. Flanders' date of maximum medical improvement, and his permanent total disability.]

Dr. Rouben last saw Mr. Flanders on January 10, 2001, with the last previous visit before that on January 10, 2000, in which he stated that, regarding meaningful, gainful employment, that his restrictions were unchanged, and that he was disabled from meaningful, gainful employment." As to whether he could be retrained for something absolutely sedentary, he stated that it was not an issue of reality ...[which] ... is that this is a man who is trained to be a load operator. His ability to read and write through 10th or 11th grade, where he was educated to, is such that this man either can use his body to work and make money or he's unemployable. (T 34)

Dr. Rouben also testified that he believed that the restrictions previously placed on Mr. Flanders by Dr. Auerbach were no longer valid, based upon his own repetitive clinical examinations since that time. He stated that Mr. Flanders is permanently disabled from gainful employment leaving sedentary activities of daily living only. This means that he can sit, stand or walk "to tolerance", probably not to exceed one hour at a time. Bending at the waist, turning or twisting at the waist on a repetitive or frequent basis is going

to manifest a precipitation of recurrent pain, weakness and disfunction. (T 43) He could drive a motorcycle for the same reasons that he could sit for a short period of time.

In an opinion based upon a reasonable degree of medical certainty, Dr. Rouben states that Mr. Flander's future prognosis is: "Profoundly guarded", dependent on his "tolerance to pain" and "his intrinsic objective function of his neurologic structures from his lower back that control his lower extremities," all related to his March 23, 1993 injury. (T 37-38) Other than that, Dr. Rouben confirmed that a device he is using on Mr. Flanders to treat pain is an "inversion table" which hangs a person by his heals, allowing the intrinsic weight of his body to stretch out and pull apart the collapsed segmental bones...." This, at least, provides temporary relief. (T 39)

When asked whether he was there as an advocate of Mr. Flanders, Dr. Rouben responded: "I am here today as Mr. Flanders' physician of record and his attending physician, and all patients that I take care of I'm ... an advocate for. ... every patient that I treat. If I don't treat 'em, I'm not their advocate." When asked about saying that Mr. Flanders "was one that you couldn't stop from working," and why he would at this time "stop him if he wanted to return to some type of work, Dr. Rouben stated that he was not willing to assume his medicolegal responsibility for irreversible neurologic compromise." (T 44) He admitted that he had allowed him to return to work with "neurologic compromise," in the past, and that he continued to treat him. (T 45) **[I do not find this to be contradictory. Dr. Rouben allowed him to continue working at one point in time, but not at another when the symptoms of his condition had gotten worse. I find this a logical course of events for a treating physician to take, based upon the continuing clinical testing that he was evaluating especially with a patient who clearly wanted to work.]**

Dr. Wolens:

In his post-hearing opinion at the request of the Employer, Dr Wolens stated:

> In light of this individual's history, operative intervention, electro-diagnostic findings, and imaging studies, it is certain that this individual has a high degree of spinal pathology. I do not find it implausible to believe that this individual has high degrees of pain and associated disability. It is important to understand, however, that disability is a function of impairment, job task to be performed and motivation. It is motivation, however, that tends to be the predominant factor in determining a patient's ability to function socially and vocationally. Therefore, if we assume this individual to be highly motivated, there are likely opportunities available to him, though these are likely to be significantly restricted. (Emphasis added.)
>
> Given my understanding of this case and based on the last sets of information provided to me in the year 2000 ending in January of 2001, I would recommend the following restrictions:

1. Avoidance of excessive bending or twisting at the waist.

2. Occasional lifting of 30 lbs. with more repeated lifting at 10 lbs.

3. Avoidance of bending and lifting from floor level on anything more than an occasional basis.

4. Avoidance of squatting, kneeling and climbing of structures other than stairs.

5. Preferably the ability to stand, sit or move at will. I suspect this individual's greatest intolerance would be to prolonged sitting.

In summary, this individual does likely retain vocational function. It is not unreasonable, however, to believe that a significant degree of restrictions would be required to accomplish this. (Emphasis added.)

I find that this opinion of Dr. Wolens supports, rather than negates, the opinion of Dr. Rouben, which, when analyzed in relation to that of Dr. Rouben, actually defers to the restrictions of Dr. Rouben.

Vocational Consultant Ms. Stone:

The Employer's Vocational Consultant, Ms. Catherine Stone, MRC, CRC, provided two opinions regarding Mr. Flanders' potential for jobs utilizing the restrictions of Drs. Rouben and Auerbach in the first (EX 1), and Drs. Rouben and Wolens in the second. (EX 8) The second, supplemental opinion was done without an additional meeting and personal evaluation with Mr. Flanders, and failed to consider and apply Dr. Rouben's restrictions, to which Dr. Wolens ultimately deferred. Therefore, I give Ms. Stones recommendations no weight, and will not review them here.

In addition, while Ms. Stone noted that for purposes of her survey, the 11/15/01 restrictions of Dr. Rouben state that Mr. Flanders is not capable of any gainful employment or significant physical activity, she also considered that Mr. Flanders is assumed to remain capable of performing routine activities of daily living, including bathing, grooming, dressing, standing, walking, and sitting, from which she opines that he therefore remains capable of at least Sedentary and Light activities as defined by the Dictionary of Occupational Titles, US Dept. of Labor. **[Since the above delineated limitations on activities as described by Dr. Rouben and Mr. Flanders would clearly impact activities of daily living which he cannot sustain, her assumption is not supported by the record. I therefore find that initial report to be without proper foundation, and entitled to little or no weight.]**

When asked about the opinion of the Employer's Vocational Expert, Miss Catherine Stone, that Mr. Flanders "had little motivation to return to work," and about his major limiting factor

preventing him from returning to an employment status at that time, Dr. Rouben replied, in part:

> It's not the Mr. Flanders that I know, but it is the Mr. Flanders who would be interviewed by a female. Mr. Flanders is one of a type of person who will not open up to a woman because any articulation of a true personality, true feelings, ... he's just not gonna communicate with a woman because that's the way he is.

(T 35-36)

He testified that this opinion was based on twenty three years of experience as a physician and orthopedic surgeon treating patients on a one-to-one basis; fifty years as a male, and Mr. Flanders' "overt articulation of his hesitancy to be open and forthright with women on a one-to-one basis." (T 45)

Dr. Rouben's Final Report:

Dr. Rouben testified that if any of the jobs the employer's vocational consultant identified as ones that he could perform within his restrictions, (telemarketer, collection agent, production clerk, surveillance systems monitor, sales attendant, dispatcher, mail clerk, courier attendant, photo finisher, and electronics worker**),** required him to sit or stand in excess of one hour a day without relief and perform at a level described on cross examination, it was his opinion that: "He couldn't perform those jobs." He confirmed that some of those jobs would require an ability "to articulate the English language in a coherent, cogent form that would be well received by those on the other end..," and would "question whether he could do that." (T 48 - 49) **[Paraphrasing Dr. Rouben's opinion, I interpret his statement to mean that Mr. Flanders could not do those jobs at all due to his education and communication deficit, or that he could not sustain employment in the jobs mentioned for eight hours a day, five days a week.]**

As a person who has treated Mr. Flanders for on a monthly basis, then at every six months, when asked whether Mr. Flanders appeared to be person that lacked motivation to return to work, he responded: "Absolutely not." **[Compared with a person in another profession, even though a vocational professional, who was neither a doctor nor a PhD and who had evaluated the Claimant for one half hour, I give Dr. Rouben's opinion on this matter more weight than Ms. Stone on the matter of his motivation, based upon Dr. Rouben's years of training and experience, and his years of examination and evaluation of the Claimant, and his consistency in his testimony on this matter via deposition.]**

Dr. Rouben also replied to the reports of Dr. Wolen and Ms. Stone as follows:

> A fall of this nature is traumatic. Retrolisthesis at the 5-1 level was noted at that time. [While] the patient may have had some disk space narrowing and early degenerative spondylosis, but certainly, the level of trauma as reported certainly has an initiating factor that is more likely than not to have placed his already degenerative spine at risk, ... over and above the preexistent degenerative factor.
>
> [I]substantiate that this patient has not been examined by Dr. Wolens.

> Dr. Wolens does not know of and does not have the benefit of my repetitive examination for the last eight years, does not appreciate that this patient has lost height, and does not appreciate that this patient now has a degenerative scoliosis. I state that is it my opinion that it is more likely that [sic: than] not that he would not have necessitated operative interventional treatment had he not had the precipitating fall in 1993.

(CX 3)

Most importantly, Dr. Rouben continued:

> We see patients all the time with significant radiographic degenerative changes who continue to work. This man has structural instability. He had a progressive degenerative deterioration after his injury. We appreciate that this man has stated and proven from the outset, his desire to continue to work, and his desire to be a cooperative participant in the treatment process. There is no reason to think that now he has any other reason or change in his personality other than to return to work if he could. A clinical assessment and clinical examination, along with the benefit of repetitive examinations affirmed conclusively in my opinion, based on twenty-four years of treatment of spine patients, based on my board-certified status, and based on the fact that I am an actively practicing spinal surgeon, that this man is incapable of performing meaningful and gainful employment based on the plethora of radiographic and clinical presentations. To force this gentleman to work in his present physical status and condition, is to me, cruel and unusual punishment.
>
> It seems a shame that there is such an aggressive effort on his employer to mandate this gentleman to work in his compromised status and compromised situation. We know there are many times when patients do make an aggressive effort to take advantage of the system. However, this is a gentleman who, from the outset, has impressed me with his desire, commitment, and willingness to stand tall, to have a sense of self-respect as a man to provide an income for his family if he could. I think that in his particular case he just simply cannot, and he should not be coerced into an activity level that exceeds his ability to function.
>
> This is my opinion and I will stand by it. If it appears that my opinion may have changed from the past, I substantiate this change of opinion based on the benefit of clinical examination presentation, clinical examination in the record.

(CX 3)

I credit Dr. Rouben's report in full. It is consistent with his prior reports, which are all well reasoned and well documented, and demonstrate Claimant's progression from his recovery from the original injury, hisreturn to work by begging for no restrictions; his working through pain to fulfill the obligations of his employment without those restrictions, and the dangers in May of 1999 if he continued - which he was apparently willing to do. He has clearly documented his own effort to support this Claimant's attempts to remain at work, as well as to call the stopping point, to the best of his well qualified ability to do so. This gallant effort on the part of the Claimant and his treating physician to keep him at work benefited the employer in unmeasurable terms. I accept Dr. Rouben's final reports as saying what I will now put in my own terms: Mr. Flanders gave his final effort at meaningful employment to his Employer, Cooper/T. Smith Stevedoring. He could work no more.

Vocational Consultant Brown/Lane:

Claimant's Vocational Consultant, Sharon Brown Lane's February 28, 2002 report (CX 4) is more than adequate to refute the positions taken by Ms. Stone on job availability for a man in Mr. Flanders' condition. She applied Dr. Rouben's restrictions, which were not considered by Ms. Stone, and eliminated all those involving good communication skills, in addition to any physical exertional abilities or limitations that might have been considered as qualifying factors for those positions. Her Wide Range Achievement Test-3 were scored very poor in reading, spelling and arithmetic and he would have done poorly in keyboard activity required by so many of those jobs. Those that might have been available often required months of training, which, besides the requirements of the jobs themselves, such as telemarketing jobs, Mr. Flanders physically could not have been endured on a sustained basis as a result of his pain and inability to focus.

In other words, Ms. Lane credibly found, and I concur, that the employer has not found any suitable alternative employment that Mr. Flanders could perform.

CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Incorporated*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Anderson v. Todd Shipyard Corp.*, 22 BRBS 20, 22 (1989); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyard, Inc.*, 14 BRBS 148.9 (1981); *Brandt v. Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Sargent v. Matson Terminal, Inc.*, 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969), *cert. denied*, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. *Durrah v. WMATA*, 760 F.2d 320 (D.C.

Cir. 1985); *Champion v. S & M Traylor Brothers*, 690 F.2d 285 (D.C. Cir. 1982); *Harrison v. Potomac Electric Power Company*, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. *See* 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980); *Anderson v. Todd Shipyards, supra*, at 21; *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "*prima facie*" case. The Supreme Court has held that a "*prima facie*" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/ Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1318 (1982), *rev'g Riley v. U.S. Industries/ Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, *i.e.*, harm to his body. *Preziosi v. Controlled Industries*, 22 BRBS 468, 470 (1989); *Brown v. Pacific Dry Dock Industries*, 22 BRBS 284, 285 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56, 59 (1985); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kelaita, supra*; *Kiel v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Kier, supra; Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. §902(2); *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of*

Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

With regard to the prima facie requirements, the parties stipulated that Claimant sustained physical harm or pain, and that an accident occurred in the course of his employment which caused it. In the present case, Claimant alleges harm to his body, *i.e.*, March 23, 1993 Claimant fell from one ladder onto another on the Employer's dock, resulted in an injury to his lower back that hard work for the employer later resulted in severe damage at the L2-L3, L3-L4, L4-L5 and L5-S1 spine levels, leading to scoliosis and a permanent impairment to his back. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment, and has in fact stipulated to the injury, (see, *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The evidence verifies the stipulations to this effect. Thus, Claimant has established a *prima facie* claim that such harm is a work-related injury, as shall now be discussed.

Nature and Extent of Injury:

Where it is uncontroverted that a claimant cannot return to his usual work, a *prima facie* case of total disability has been established, and the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The claimant's diligence is relevant only after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687.

I have found that Claimant may not return to his ususal work based upon the above findings of Dr. Rouben in which he determined that Claimant had "progression of pain, weakness, numbness and inability to sleep at nighttime" which was "more accentuated with associated weakness" when working heavy machinery, and that this change was sufficient to cause him to cease his long struggle to continue to work.

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F. 2d 773 (1st Cir. 1979); where the claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979); the claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979); and on the basis of Claimant's credible complaints of pain alone, *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there

is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978); or that claimant be bedridden to be totally disabled, *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell*, 11 BRBS at 289. *See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Co.*, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. *Watson*, 400 F.2d at 655.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Mr. Flanders must be considered permanently and totally disabled based upon the credited testimony of Dr. Rouben and the consistent testimony of Mr. Flanders. It is my opinion that, while Dr. Rouben did not specifically state on May 10, 1999 or May 24, 1999 in his report that on May 5, 1999, when Claimant could no longer perform the duties of his job, that this was his date of maximum medical improvement, it was at least the latest date of such improvement and I find it to be his date of maximum medical improvement.[3] He obviously had residual disability, and from the testimony of Dr. Rouben credited above, further medical treatment would not improve his condition.

Extent of Disability:

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *Id.* at 1266.

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational

[3]I take note of the fact that the parties stipulated to a date of August 28, 2000 as the date of maximum medical improvement (MMI). However, the facts better support an MMI date of May 5, 1999.

disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

Moreover, although a claimant relocates for personal reasons, employer can still meet its burden of establishing suitable alternate employment if it shows that such jobs are available within the geographical area in which claimant resided at the time of the injury. *McCullough v. Marathon LeTourneau Co.*, 22 BRBS 359, 366 (1989); *Dixon v. John J. McMullen and Associates*, 19 BRBS 243 (1986); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

On the basis of the totality of the record, I find that Claimant has established he cannot return to work as a heavy equipment operator at Cooper/T.Smith Stevedoring, and is therefore totally disabled therefrom.

The burden thus rests upon Employer to demonstrate the existence of suitable alternative employment in the area. If Employer does not carry this burden, Claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

For the reasons stated above in the vocational reports of Ms. Stone, whose report has been given no weight based upon her failure to follow the credited restrictions of Dr. Rouben, and the report of Dr. Lane who accentuates the failure of Ms. Stone's report to properly consider Mr. Flanders' educational, reading, writing and communication deficiencies in relation to his physical restrictions, I find that the Employer has failed to meet its burden of establishing suitable alternative employment.

Loss of Wage Earning Capacity:

As I have found Mr. Flanders to be permanently and totally disabled, he is not eligible for an award of permanent partial disability. Accordingly, I make no determination regarding loss of wage earning capacity.

Average Weekly Wage:

The Act provides that injured employees shall receive compensation for permanent total disabilities based upon a percentage of their average weekly wage (hereinafter referred to as AWW). 33 U.S.C. § 908(a). The AWW for disability compensation is based upon the injured employee's AWW at the time of injury. 33 U.S.C. § 910. Although the Act defines time of injury for occupational diseases[4], it does not do so for traumatic injuries like the one sustained by Mr. Flanders. *See Port of Portland v. Dir., OWCP*, 192 F.3d 933 (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

Mr. Flanders contends that his average weekly wage should be calculated under § 910(c), because "'otherwise harsh results' would occur in calculating [his] wage loss on 1993 wages when he worked for the company off and on until 1999." (Claimant's Brief, p. 29). Mr. Flanders cites case law that "§ 910(c) is intended to grant the Judge that broad discretion to ensure that remedial purposes of the Act are indeed invoked", and that "§ 910(c) contains no limiting provisions, . . but includes all of the employee's relevant work experience, . . . [in order that the Judge] arrives at a sum that reasonably represents claimant's annual earning capacity at the time of injury. (*Id.*). Cooper/T. Smith argues that § 910(a) applies, which requires that Mr. Flanders' AWW be calculated using the wages earned by Mr. Flanders during the year preceding his injury on March 23, 1993. (Employer's Brief, p. 15, 16). Section 910 provides:

> Except as otherwise provided in the Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

[4]For occupational diseases, the "time of injury" is the date when the Claimant became aware (or should have been aware) of the relationship among the employment, disease and disability. 33 U.S.C. § 910(i).

> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(a)-(c). Once the average annual earnings are computed, they are divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d).

Mr. Flanders' time of injury must be ascertained in order to determine the appropriate subsection of § 910 to apply. The Ninth Circuit has held that for victims of a traumatic accident, like the victim of an occupational disease, the time of injury should be set at the time his latent disability manifested itself, not at the time of the accident. *Johnson v. Dir., OWCP*, 911 F.2d 247, 248 (9th Cir. 1990). Johnson, a scaler working in a shipyard, fell through an opening in a vessel and injured her hands, wrist, and hip in 1979. *Id.* She continued to work intermittently after her injury, but was forced to stop four years later due to continued pain and increased swelling in her hands. *Id*. The court in *Johnson* analogized the manifestation of latent and unknown injuries in accidental injury cases to the rationale employed by § 910(i) for making the time of injury in occupational disease cases coincide with the manifestation of disability. *See Port of Portland*, 192 F.3d at 938. The holding in *Johnson* was based chiefly on the fact that Johnson continued to work after her accidental injury, as is true for workers exposed to asbestos, for example. *Id.* The manifestation theory was designed to serve the purposes of § 910: to compensate a worker for a loss of future earning capacity rather than for loss of past earning capacity. *Johnson*, 911 F.2d at 250. The Ninth Circuit reasoned that the manifestation theory prevents an application of § 910 that would discourage workers from returning to work. Without such a holding, it would be to the claimant's advantage to file a claim of disability as soon as possible in order to begin receiving benefits at that level sooner rather that later. *Id.*

The Fifth Circuit faced a case with remarkably similar facts and involving the same employer as the instant case, yet Employer did not cite to it, nor did Employer advance the theory it espoused. *See LeBlanc v. Cooper/T.Smith Stevedoring*, 130 F.3d 157 (5th Cir. 1997). The Fifth Circuit held in *LeBlanc* that "the manifestation theory is not applicable to traumatic injury claims under the LHWCA, rather that the statutory time of injury in such cases is the time of the accident that causes the injury. *LeBlanc*, 130 F.3d at 162. In 1987, LeBlanc fell from a ship ladder and injured his lower back, as Mr. Flanders did. *Id*. at 158. LeBlanc continued to work for Cooper/T.Smith, with intermittent absences due to back pain, until he was diagnosed in 1992 with degenerative facet disease in the lumbar region of his spine. *Id*. at 159. Recognizing that the Ninth Circuit's holding in *Johnson* was formed by an analogy to Congress' codification of *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) into § 910(i), the Fifth Circuit observed that § 910(i) only extended the manifestation theory to occupational diseases. *Id.* The Fifth Circuit then reasoned that "Congress chose not to qualify traumatic injuries, even those that get worse over time, for this treatment, therefore, the Ninth Circuit approach is contrary to the legislative intent regarding the extent of benefits available under the LHWCA. *Id*. The holding in *LeBlanc* also voiced the Fifth Circuit's agreement with *Dir., OWCP v. General Dynamics Corp. (Morales)*, 769 F.2d 66, 68 (2d

Cir. 1985), where the Second Circuit held that the BRB must fix the rate as of the date of [claimant's] injury, rather than as of the date of the manifestation of their later problems. *Id.*

The application of the manifestation theory is a novel issue in the Sixth Circuit, the jurisdiction under which this claim arises.[5] However, the Benefits Review Board has stated that they will follow the holding of the Fifth and Second Circuits in *LeBlanc* and *Morales* for all cases except for those arising in the Ninth Circuit, where *Johnson* controls. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 173 (1998). Therefore, in accordance with existing Benefit Review Board law, I find that Mr. Flanders' time of injury is March 23, 1993. Pursuant to § 910(a) and the stipulation of the parties, I find that Mr. Flanders' average weekly wage at the time of injury was $523.72.

Temporary Total Disability Payments:

Mr. Flanders' alleges that a deficiency exists in the amount of payments he received for various periods of Temporary Total Disability between 1993 and 1997. Mr. Flanders' contends that "[t]he statute provides for a 5 percent cost of living increase on the injured employees wages. *SGS Control Services v. Dir., OWCP*, supra at 442." A careful reading of § 910(f), which is the statute cited in *SGS Control Services*, reveals that it only applies to "compensation or death benefits payable for permanent total disability or death arising out of injuries." 33 U.S.C. § 910(f). Therefore, I find that Mr. Flanders' suffered no shortfall in payment of TTD benefits.

Medical Benefits:

Under the provisions of 33 U.S.C. § 907(a), the Act obligates the payment of medical expenses for such period as the nature of the injury or the process of recovery may require. See, *e.g.*, Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Claimant is entitled to the reimbursement of medical benefits reasonably and necessarily incurred as a result of his work related injury in this case. As stasted by the Claimant in his brief, on the date of the hearing, Claimant submitted his Exhibit 2 which showed prescription expenses in the amount of $116.99, for which the employer had not reimbursed Mr. Flanders. Employer indicated on the record that the expense had never been tendered to the employer to pay, but stated that it could agree to pay it subject to verification through Doctor Rouben's records, and did not anticipate any problem in so doing. Claimant indicated in his brief that it had not been paid. Based upon the determinations herein, that medical expense and others incurred since then, if any, must all be reimbursed.

The Responsible Employer:

Cooper/T. Smith Stevedoring was the employer with whom Claimant had his most recent period of cumulative covered employment, and, therefore the properly designated responsible

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[5]I maintain the opinion that the Ninth Circuit's application of the manifestation theory to traumatic injuries would better serve the purposes of the Act than the Fifth Circuit's textualist reading; especially in a case such as this. The Ninth Circuit framed their opinion to serve the broader Congressional intent behind § 910, while the Fifth Circuit merely looked to the more narrow Congressional intent behind the codification of § 910(i). I also note, as a matter of statutory construction that the specific inclusion of the manifestation theory in occupational disease cases recognizes an exception that does not include progressive trauma for injury cases. However, injured workers who attempt to return to work should not be discouraged from such a return by the prospect of being compensated according to their wages at the time of the accident should their attempt fail.

employer, herein.

Attorneys Fee:

The Claimant's attorney has not filed an itemized application for attorney's fees and costs herein.
A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director. Therefore,

It is therefore ORDERED that:

1. Assuming that the Claimant's average weekly wage was correctly stipulated to be $523.72, Claimant's temporary total disability payments of $349.15 from April 2, 1993 through October 19, 1997 were also correct, subject to corrections that may be required in the precise calculation of these figures by the District Director, and no further temporary permanent disability benefits are warranted.

2. Commencing within three days of his final day of work on May 5, 1999, the Employer shall pay to the Claimant compensation benefits for his permanent total disability.

3. Claimant shall be paid benefits based upon his average weekly wage at the time of his permanent total disability as otherwise set forth herein, in the amount of $523.72 per week at the compensation rate under Section 8(a) of the Act of two thirds that amount, which is $349.15 per week, plus the applicable annual adjustments provided in Section 10(f) of the Act, effective October 1 of each of the following years and as determined thereafter: 1999 - 3.39%; 2000 - 3.61%; and 2001 - 3.45%, subject to corrections that may be required in the precise calculation of these figures by the District Director.

3. Any amounts paid in State compensation benefits for respiratory impairment during the relevant time period may be deducted from the amount paid to the Claimant upon proper showing to the District Director.

4. The Employer shall receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein, if any.

5. The Employer shall reimburse such reasonable, appropriate and necessary medical care and treatment expenses as the Claimant's work-related injury referenced herein may require, including but

not limited to the prescription charge of $116.99.

6. The Employer shall pay the Claimant's attorneys fees and costs subject to proper application therefore, as otherwise set forth herein.

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THOMAS F. PHALEN, JR.
Administrative Law Judge